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FILED
APR 13 1940

No. 868

# In the Supreme Court of the United States

October Term, 1940

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Thomas Hinton, Petitioner

vs.

Guy T. Helvering, Commissioner of Internal Revenue

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MEMORANDUM FOR THE RESPONDENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the granting of a writ of certiorari in this case.

In the petition for certiorari it is asserted that the decision of the court below that the taxpayer was not engaged in carrying on a trade or business in respect to his investments in stocks and bonds is in conflict with *Kales* v. *Commissioner*, 101 F. (2d) 35 (C. C. A. 6th), and with the decision of the Circuit Court of Appeals for the Third Circuit in

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*du Pont* v. *Deputy*, 103 F. (2d) 257, reversed on another ground by this Court, 308 U. S. 488.*

The court below held that Section 23 (a) of the Revenue Act of 1932, in allowing deduction of ordinary and necessary expenses in "carrying on any trade or business," uses the quoted words in their popular meaning, and that their popular meaning does not embrace the conserving or enhancing of one's estate. While we think that this view of the court below is correct, it is contrary to the holding of the circuit court of appeals in the *du Pont* case and probably cannot be reconciled with the decision in the *Kales* case.

In view of this conflict of decisions the granting of a writ of certiorari in the present case is not opposed.

Respectfully submitted,

NEWMAN A. TOWNSEND,
*Acting Solicitor General.*

AUGUST 1940.

* The question whether a taxpayer's activities in conserving and enhancing his estate constitute the carrying on of a trade or business within the meaning of the Revenue Act was reserved by this Court in the *du Pont* case, the Court stating that it was unnecessary for it to pass upon the question because in its opinion the deduction sought was on other grounds not properly allowable in that case.

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